

arrange for basic telephone service. SBT uses that contact to solicit interest in MemoryCall<sup>®</sup>. This vast marketing opportunity is uniquely possessed by SBT. SBT claims that this circumstance does not constitute an unfair advantage. See, Testimony of Daniel, Transcript, p. 538. The competitors of MemoryCall<sup>®</sup> take an opposite view, which the Commission shares. See, Testimony of public witness P. Andreson, a competitor of MemoryCall<sup>®</sup>, listing numerous MemoryCall<sup>®</sup> marketing practices contended to be unfair, Transcript, p. 43, l. 18 to p. 46, l. 4 and p. 46, l. 21 to p. 47, l. 2.

SBT's position as monopoly provider of local exchange service allows it to develop and access a data base of information on customers known as CPNI. CPNI contains all the information SBT has on each telephone customer, including the customer's credit history, number of lines, services, and special calling features. This information, together with customer call completion data that is available exclusively to SBT, is indispensable for a targeted marketing campaign and has been used by SBT in its own marketing. See, Testimony of Burgess, Transcript, p. 67 and p. 176, l. 8 to p. 179, l. 12; Testimony of Madan, Transcript, p. 194, l. 15 to p. 197, l. 3.; Testimony of Daniel, Transcript, p. 542.

Both SBT and its competitors may obtain access to CPNI. All that is required is authorization from the customer. However, SBT has set up a system for CPNI authorization that disadvantages its competitors. Under the system SBT has set up, CPNI is available for immediate on-line, real time use by SBT unless SBT's customer

explicitly and in writing prohibits that information being available. On the other hand, if a MemoryCall<sup>®</sup> competitor wishes to access CPNI, SBT requires that its competitors obtain explicit authorization from the customer in order to view the information. See, Testimony of Burgess, Transcript, pp. 176-79; Testimony of Daniel, Transcript, pp. 494-97. The procedures set up deny either on-line or real time access to CPNI by MemoryCall<sup>®</sup> competitors. See, Testimony of Saner, Transcript, p. 270, l. 17 to p. 271, l. 1. Indeed, SBT admits its advantage in this area. See, Testimony of Daniel, Transcript, pp. 495-500. Nonetheless, SBT refuses to equalize the procedure for access to CPNI. Id.

As shown by the evidence in this case, in order for a TAS Bureau client to utilize the TAS Bureau's competing service, the client must arrange for some form of call forwarding through SBT. When contact is made with SBT for that purpose, SBT markets MemoryCall<sup>®</sup>. See, Testimony of Burgess, Transcript, p. 66. SBT claims to have instructed its employees to cease this practice. However, there is evidence that unfair marketing continues to occur. See, Testimony of Daniel, Transcript, p. 581. In addition, repair service personnel have marketed MemoryCall<sup>®</sup>. Once again, SBT claims to have stopped this practice. However, there are reports that such practices persist. See, Testimony of Daniel, Transcript, pp. 578-79.

SBT uses its monopoly billing service to bill for MemoryCall<sup>®</sup>. See, Testimony of Burgess, Transcript, p. 66. Under this approach, MemoryCall<sup>®</sup> customers are charged for that service in a manner that

does not identify the charge separate from SBT's charge for basic telephone service. Rather, the charge is bundled together with the charges for regulated calling features. The charge appears as a single item designated "enhanced services." See, Testimony of Dunn, Transcript, p. 351. This practice facilitates collection because it incorporates MemoryCall<sup>SM</sup> billing into the monopoly billing service. This practice also simplifies the process for the customer and makes MemoryCall<sup>SM</sup> more attractive. Other independent voice messaging services have requested that they be permitted to bill in a similar fashion, so that their customers can also benefit from a simplified billing process. SBT refuses to honor these requests. See, Testimony of Daniel, Transcript, p. 501.

In addition, SBT uses its monopoly billing service to promote (i.e., advertise and solicit) MemoryCall<sup>SM</sup> service. SBT does not allow other voice messaging services to utilize this marketing channel. See, Testimony of Daniel, Transcript, p. 540; Testimony of Dunn, Transcript, p. 350.

In the Commission's view, the record with respect to SBT's marketing of MemoryCall<sup>SM</sup> shows that SBT will not make even a cursory attempt to curb potential and actual abuses of its monopoly position unless and until regulatory intervention is threatened or occurs. SBT's assertion that it will and has now taken steps to prevent such abuses, even if believed and even if it is assumed that such steps will prove effective, simply misses the point. As succinctly stated by ATC, an intervenor in this case, what

"SBT appears to overlook is that an appropriate competitive environment cannot be

maintained in the long run by simply having SBT correct its abusive practices after the fact. Rather, long run competition requires that SBT compete on a basis that removes the opportunity and incentive for abuse of the monopoly, or at least minimizes the likelihood that such abuse will occur."

See, ATC post-hearing brief, p. 4.

SBT asserts that it enjoys economies of scale, particularly with respect to marketing, that allow it to offer MemoryCall<sup>SM</sup> at prices below those at which its competitors offer their services. It is clear to the Commission that the principal economies of scale advocated by SBT in this proceeding are advantages derived largely, if not exclusively, by virtue of SBT's monopoly position as provider of local exchange service. See, Testimony of Daniel, Transcript, pp. 489-492, 500-03, 512, 538. See also, the recitals herein of the advantages enjoyed by SBT regarding billing and marketing, including especially initial contact with customers and use of CPNI; Testimony of public witness S. Taylor, a competitor of MemoryCall<sup>SM</sup>, regarding the unfair advantage SBT enjoys in marketing MemoryCall<sup>SM</sup> because of SBT's unequal access to CPNI, Transcript, p. 47, l. 19 to p. 49, l. 8. SBT's posture is that if it is allowed to utilize the advantages of its monopoly position, it can offer MemoryCall<sup>SM</sup> less expensively than any of the services that compete with it. However, these economies of scale are advantages SBT appears to enjoy solely due to its monopoly position. There appears to be no sound policy reason to allow SBT to leverage its monopoly position to the detriment of a competitive VMS market through these practices, especially where it has not been

demonstrated that fair compensation is being paid to ratepayers who pay the price for the monopoly position that SBT is able to leverage. See, Section III.C.3 below.

3. Cross-Subsidies and the Possibility of Predatory Pricing

Nothing in this record disproves the possibility that MemoryCall<sup>®</sup> is cross-subsidized and/or predatorily priced. Rather, the record suggests the opposite possibility, namely that MemoryCall<sup>®</sup> is priced below cost. See, Testimony of Burgess, Transcript, p. 71, l. 25 to p. 76, l. 2; p. 117, l. 5 to p. 118, l. 15. See also, Testimony of public witness P. Andreson, a competitor of MemoryCall<sup>®</sup>, that MemoryCall<sup>®</sup> cannot be offered at the price charged by SBT and cover the true cost to SBT of even just the phone lines, trunk lines and equipment necessary to technically provide MemoryCall<sup>®</sup>, Transcript, p. 46, l. 5 to l. 20; Testimony of Saner, establishing numerous issues of predatory pricing and cross-subsidy relating to MemoryCall<sup>®</sup>, Transcript, p. 297, l. 1 to p. 315, l. 20.

The ultimate answer to the question whether MemoryCall<sup>®</sup> is predatorily priced (i.e., improperly cross-subsidized) is relatively simple. SBT shall file, and all interested parties shall have the opportunity to analyze and assess a complete cost of service study for MemoryCall<sup>®</sup> service, including all workpapers thereto. In the Commission's view, this is the only reliable way in which the issues of cross-subsidy and predatory pricing can be definitively determined.

The fact that the record in this case does not currently contain the data from which such an analysis can already be made is troubling. The Commission's First and Third Supplemental Orders, issued in March, 1991 in Docket No. 3896-U, required SBT to file sufficient cost data demonstrating that the proposed rates for MemoryCall<sup>SM</sup> service are just and reasonable. SBT made no such filing. Indeed, SBT filed no cost data of any type at all until the last day of the hearings in this case, Docket No. 4000-U. Ostensibly, the reason was that the prior orders of the Commission requiring such filing were stayed by the Fulton County Superior Court in April, 1991. Whatever the reasons, the actual cost analysis filed by SBT at the close of this Docket is insufficient to allow the record in this case to reflect a detailed, reasoned analysis of the true cost to SBT of providing MemoryCall<sup>SM</sup>. There are at least two reasons why this is true.

First of all, the data that SBT did supply was filed with the Commission only hours before the record in this Docket was concluded. No party had sufficient time to analyze and discover the matters raised by the cost analysis. In addition, the cost data supplied by SBT is not a complete cost study. It is at best a summary of a cost analysis. It does not constitute a complete cost study, including all workpapers. Moreover, even SBT's summary excludes what it considers to be sensitive and/or proprietary information.

#### IV.

##### THE POLICY TO BE ADOPTED

The broad regulatory goal set by the Commission is to promote the development of intrastate ES and VMS markets to their efficient, competitive extreme. The Commission believes that this policy serves the long term best interest of SBT, its ratepayers, the telecommunications public and the general economic welfare of this State. Attainment of this goal is promoted by SBT's presence in these markets if that presence assists, rather than retards development toward efficient, competitive ends. SBT's presence in the ES and VMS markets will have the desired effect only where its ability and incentive to defeat competition by use of its monopoly control over the local telephone system is prevented and/or deterred. In the specific context of this case, the Commission embarks on a course designed to foster development of the VMS market to its efficient, competitive end by encouraging SBT's presence in the VMS market under conditions that prevent and/or deter SBT's opportunity and interest to use its monopoly control of the local telephone system to defeat competition. We do so by embracing the following policy positions.

First, we note and adopt the policy of promoting the development of ES markets, specifically including the VMS market, to their efficient, competitive extreme, as described above and elsewhere in this Order.

Second, we state our belief that SBT's proper participation in the ES and VMS markets is an important, positive ingredient if the Commission's broad regulatory goal is to be attained.

Third, we embrace the general regulatory framework for regulating SBT's provision of ES and VMS, as established by the Staff in this case. That framework is consistent with the Commission's broad regulatory goal. See, Testimony and Appendix of Jamshed K. Madan, the content of which is incorporated herein by reference as if fully restated.<sup>23</sup> Specifically, we state our

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<sup>23</sup>The conclusions and recommendations of the Staff are summarized in Mr. Madan's testimony as follows (Transcript, p. 83, l. 1 to p. 85, l. 7).

1. As a general rule, SBT's provision of enhanced services should be fully regulated to the extent permitted by law, until such time as the enhanced service is subject to complete competition. The Commission may exercise less than full regulation prior to complete competition if the facts demonstrate there is a need for less than full regulation.
2. Full regulation means the price of an enhanced service is set by tariff approved by the Commission, the revenue requirement of the enhanced service is treated above the line and practices constituting impermissible cross-subsidy and unfair, anti-competitive behavior are detected and checked. Full deregulation means that an enhanced service is detariffed, the revenue requirement is treated below the line and no checks on cross-subsidy or anti-competitive behavior are applied.
3. At no time prior to full deregulation of an enhanced service should the revenues, expenses and investment associated with the enhanced service be treated below the line.
4. During the period when enhanced services are regulated, the Commission should take steps to ensure appropriate allocation of the cost of services that are shared between the regulated side of SBT and the enhanced service, the goal being to preclude impermissible cross-subsidy.



belief that applying the regulatory framework described by the Staff to SBT's provision of MemoryCall<sup>SM</sup> service will have the result designed by the Staff: The VMS market will stand its best chance of developing to a condition of complete competition. The Commission views complete competition to be the functional equivalent of driving the VMS market to its efficient, competitive end. Therefore, once the appropriate regulatory controls are put in place as referenced below, SBT's provision of MemoryCall<sup>SM</sup>

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5. The Commission should not determine whether it shall fully deregulate SBT's provision of an enhanced service until it has been demonstrated to the Commission's satisfaction that complete competition exists with respect to the enhanced service. The Staff comments upon the type of market conditions and other factors that may be important to investigate in order to determine whether complete competition exists, however, the Commission should set a proceeding to define with particularity the test of complete competition that must be met before the Commission will consider fully deregulating an enhanced service.
6. At the point when it has been shown to the Commission's satisfaction that an enhanced service is subject to complete competition, both the Commission and SBT should be indifferent to whether the revenues, expenses and investment associated with enhanced services are treated above or below the line for purposes of determining intrastate, regulated cost of service. At that point the Commission is faced with a policy decision whether to fully deregulate an enhanced service by taking the revenues, expenses and investment below the line.
7. Even where the Commission chooses to fully deregulate an enhanced service because it is satisfied that an enhanced service is subject to complete competition and that SBT is not engaged in improper anti-competitive practices, the Commission should retain its jurisdiction to regulate the enhanced service where conditions of complete competition do not persist or where policy considerations otherwise dictate that the enhanced service should be re-regulated.

service shall thereafter be regulated in the manner described by the Staff.<sup>24</sup>

Fourth, the Commission determines that SBT's current, virtually uncontrolled presence in the VMS market presents the opportunity and incentive for SBT to use its monopoly control of the local telephone system to defeat competition. SBT's actual

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<sup>24</sup>A summary description of the specific ratebase, rate of return method of regulating MemoryCall<sup>SM</sup> is provided by Mr. Madan (Transcript, p. 86, l. 17 to p. 87, l. 23) as follows:

1. As a general rule, the Commission should fully regulate SBT's provision of enhanced services until such time as SBT's provision of the enhanced service is subject to complete competition.
2. During at least the initial period of regulation, the price for MemoryCall<sup>SM</sup> and other enhanced services should be set by tariff approved by the Commission. Upon appropriate showing by SBT, the Commission may partially deregulate by detariffing prior to complete competition.
3. During the period of regulation, the revenues, expenses and investment associated with enhanced services should be treated above the line when determining the intrastate, regulated cost of service of SBT.
4. During the period of regulation, the Commission should pay particular attention to determining whether the allocation of the cost of services shared between the regulated side of SBT and the enhanced services are appropriate and do not lead to impermissible cross-subsidy.
5. During the period of regulation, the Commission should take steps to insure that aspects of SBT's provision of enhanced services other than revenue requirement aspects (i.e., other than pricing issues and issues about including revenues, expenses and investment above or below the line) are fair and proper. These matters would include, for instance, insuring that SBT is not unfairly using its regulated public telephone monopoly to enter into adjacent enhanced services markets by practicing unfair marketing or improperly prohibiting equal access to the local telephone bottleneck.

behavior in the VMS market during its trial of MemoryCall<sup>®</sup> has been to use its monopoly position to frustrate competition in the VMS market. Further, the Commission determines that these circumstances retard the broad regulatory goal of the Commission to promote the development of ES and VMS markets to their efficient, competitive end. The Commission therefore determines as a matter of sound policy and practice, that SBT's current position in the VMS market must be temporarily frozen so that the Commission may design and implement appropriate regulatory controls that will prevent and/or deter anticompetitive behavior by SBT. However, once those controls are designed and implemented, SBT's trial offer of MemoryCall<sup>®</sup> service should resume immediately.

Fifth, the Commission shall develop a standard for determining when complete competition exists in the VMS or other ES market. The Commission shall evaluate the development of those markets toward their efficient, competitive extreme in order to determine when SBT's presence therein may be fully deregulated.

#### V.

##### ACTION TAKEN TO PREVENT AND/OR DETER MONOPOLY ABUSE

As explained in this Order, the Commission desires to promote the development of an efficient, competitive ES market, including specifically the VMS market. SBT's presence therein will assist that development, so long as SBT is practically prevented from using its monopoly position to unfairly promote and provide its enhanced services over its competitors' similar services. The

Commission finds that the record in this case shows that SBT has both the ability and incentive to operate anti-competitively (and in fact has operated anti-competitively) in the ES market, including the VMS market. The Commission believes SBT will continue to do so unless effective, practical controls are set in place to prevent or deter such activity. Indeed, the Commission finds that SBT's current presence in the VMS market without such controls is not promoting the policy desired by the Commission. The Commission therefore will order that SBT's trial authority to offer MemoryCall<sup>SM</sup> service be placed on hold until the Commission can design and implement the controls it believes necessary to protect the market and the State's economy from SBT monopoly behavior that threatens the existence of an efficient, competitive VMS market. Specifically, the following actions will be ordered.

1. The Commission will temporarily freeze SBT's trial offering of MemoryCall<sup>SM</sup> service. The freeze means that SBT's provision of MemoryCall<sup>SM</sup> service is temporarily restricted to those specific MemoryCall<sup>SM</sup> customers who have actually subscribed to MemoryCall<sup>SM</sup> service on or before the effective date of the Commission Order in this case.

2. The Commission states that the purpose of the temporary freeze is to halt SBT's anticompetitive behavior pending filing by Southern Bell of a complete cost of service study for MemoryCall<sup>SM</sup> service, including all workpapers thereto, and pending Commission design and implementation of appropriate regulatory controls to prevent and/or deter monopoly abuse and to insure that SBT's entry

into the VMS market has the effect of assisting instead of retarding development of an efficient, competitive VMS market. The temporary freeze will remain in place no longer than necessary to achieve these ends. After that, SBT's trial offer of MemoryCall<sup>SM</sup> service will resume.

3. The Commission undertakes the following investigations/actions in order to develop the appropriate regulatory controls:

- a. Identification of the actions necessary to insure the elimination of all network access problems that have kept or it is reasonably believed may keep VMS competitors from having comparably efficient interconnection to the local system. This includes:
  1. Solving the co-location problem;
  2. Solving the LAESS switch upgrade and replacement problem;
  3. Developing system architecture besides DID architecture that provides the opportunity to provide VMS.
- b. Establishing CPNI rules and procedures to deal with CPNI problems and their resolution on an ongoing basis;
- c. Designing regulatory controls to eliminate improper marketing practices. This would include controls that:
  1. Preclude solicitation of TAS Bureau customers who call SBT to order Call Forwarding and other custom calling features;
  2. Preclude solicitation and sales of MemoryCall<sup>SM</sup> service by anyone other than a specially designated sales force;
  3. Require SBT to establish a separate marketing organization for the marketing of MemoryCall<sup>SM</sup>, complete with appropriate cost accounting controls and other organizational requirements

designed to insure that all the activities associated with Marketing MemoryCall<sup>SM</sup> and their costs are provided and accounted for separate from the operation of any other part of SBT's marketing arm, or require SBT to provide MemoryCall<sup>SM</sup> through a separate subsidiary;

4. Equalize access by all VMS competitors to SBT's monopoly billing system for use in billing for VMS services;
  5. Equalize access by all VMS competitors to SBT's monopoly billing system for use in promoting any VMS service by any means.
- d. Establishing the proper price for MemoryCall<sup>SM</sup> service by means of:
1. Performing a complete review of all relevant cost data and making an independent assessment of the true cost of MemoryCall<sup>SM</sup> service;
  2. Assessing whether and how SBT's provision of MemoryCall<sup>SM</sup> service benefits from the following aspects of SBT's monopoly position, and if so, whether the price of MemoryCall<sup>SM</sup> should so reflect:
    - a) Association with the BellSouth and/or the Southern Bell logo and name.

4. The temporary freeze shall be reexamined by the Commission once the matters listed above have been concluded so that the Commission may determine to its satisfaction that SBT can be set free in the VMS market to compete under the regulatory framework referenced below (paragraph 5) without undue risk of SBT abusing its monopoly position.

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<sup>25</sup> See, Transcript, p. 252, l. 7 to l. 15, Testimony of ATC witness Mr. Sulmonetti, establishing that ATC does not market its voice mail service as a package with its interexchange services, but rather has established a separate marketing organization for its voice mail service.

5. The Commission adopts the regulatory framework for MemoryCall<sup>®</sup> that is described in detail in the Staff's prefiled testimony in this case, which is geared to regulating SBT's presence in the VMS market and other ES markets in a way that promotes development of those markets to their efficient, competitive limits.

## VI.

### PREEMPTION ISSUES

#### A. FCC Preemption

##### 1. The Rule of Law

The scope of the FCC's jurisdiction is defined by the Communications Act of 1934.<sup>26</sup> Section 152(b)(1) of the Communications Act contains Congress' enactment of an express jurisdictional bar to the FCC's authority to act in any manner in the arena of intrastate telecommunications services.<sup>27</sup> The jurisdictional bar contained in the Communications Act has been ruled by the United States Supreme Court to preclude the FCC from preempting state regulation of intrastate telecommunications

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<sup>26</sup>See, 47 U.S.C. § 151, et seq., hereafter "the Communications Act."

<sup>27</sup>Section 152(b)(1) states in pertinent part as follows:

. . . nothing in this Act shall be construed to apply or give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . . .

services except in very narrow, limited circumstances. Those circumstances arise under what is called the impossibility exception. See, Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 106 S.Ct. 1890, 90 L.Ed.2d 359 (1986); People of the State of California v. Federal Communications Commission, 905 F.2d 1217 (9th Cir. 1990) (hereafter referred to as "California v. FCC" and the California v. FCC court as "the Court").

The impossibility exception is triggered only when the state regulator's exercise of its authority to regulate intrastate telecommunications services negates the exercise by the FCC of its own valid authority over interstate telecommunications services. Moreover, even where such conditions are proven by the FCC, the FCC's preemption order is upheld only where the FCC carries its burden of showing that every aspect of its preemption order is narrowly tailored to preempt only the state regulation or portion thereof that necessarily thwarts or impedes the FCC's valid regulation of interstate telecommunications services. That showing must be made with specificity. Id.

2. The Court's Application of the Rule of Law to Computer Inquiry III

In Computer Inquiry III, the FCC attempted to preempt virtually all manner of state regulation of intrastate enhanced services. The FCC specifically sought to preempt the states from taking three broad types of actions:

1. Tariffing intrastate enhanced services;



2. Requiring structural separation between intrastate basic services and intrastate enhanced services;
3. Requiring non-structural safeguards inconsistent with or more stringent than the FCC's system of non-structural safeguards.<sup>24</sup>

Each attempted preemptive action was struck down by the Court. In doing so, the Court made several points particularly relevant to this Commission's efforts to determine whether and how to craft a regulatory scheme to regulate SBT's provision of MemoryCall<sup>SM</sup>.

The Court rejected the FCC's attempt to impose any restrictions on a state's effort to tariff intrastate enhanced services. It appears that the Court believes that the impossibility exception cannot provide a valid basis upon which the FCC can preempt state tariffing. See, California v. FCC, p. 1242. Indeed, it appears that the FCC itself did not even attempt to defend this particular preemptive action under an impossibility exception approach. Id., f.n. 38.

The Court also struck the FCC's attempt to preempt all state regulation imposing structural separation requirements. The FCC attempted to preempt this type of state action on the theory that any state requirement to separate intrastate enhanced and basic services necessarily forces a BOC to separate their interstate basic and enhanced services, due to the fact that intrastate and interstate components of enhanced services are structurally

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<sup>24</sup>The FCC's system of non-structural safeguards amounts to basically three items: (1) application of certain ONA requirements; (2) application of certain CEI requirements; and (3) application of the Joint Cost Rules and a carrier-specific Cost Allocation Manual.

inseverable. *Id.*, pp. 1243-44. The Court struck this aspect of the FCC preemption order because the FCC failed to carry its burden of demonstrating that all state-imposed separation requirements would necessarily negate the FCC policy of permitting the structural integration of basic and enhanced interstate services.

In the Court's view, the FCC's preemption order neglected to face the possibility that some enhanced services may be offered on a purely intrastate basis. In fact, the example used to illustrate this point was voice mail services, said to be a service offered to discreet locales within a state and therefore a purely intrastate enhanced service. Thus, the FCC's attempt to preempt all state structural separation requirements was struck because the FCC did not carry its burden of showing that

the structural separation of such purely intrastate enhanced services from basic telephone service would interfere in any way with a carrier's ability to provide interstate enhanced services (or enhanced services with mixed intra- and interstate components) on an integrated basis.

*Id.*, p. 1244.

In addition, the Court rejected the FCC's inseverability contention because that contention assumed that state structural separation regulations necessarily require separation of physical facilities. The Court noted that

[s]tate regulations might require only that carriers establish separate corporate organizations for providing intrastate basic telephone and enhanced services, while allowing the same facilities to be used for both types of services. The Commission has failed to explain why requiring communications

carriers to offer *intra*-state enhanced services through a separate corporation would frustrate the Commission's goal of giving communications carriers the freedom to choose whether to integrate or separate their *inter*-state operations.

*Id.* The Court ruled that the narrow impossibility exception is not met where the FCC merely shows that some possible state structural separation requirements would negate the FCC's policy against a separate subsidiary requirement for the provision of interstate enhanced services.<sup>29</sup>

**B. Federal Court Preemption.**

Section III.A.1 herein describes the MFJ entered by the antitrust court and the line of business restrictions placed on the BOCs pursuant to the MFJ. Section III.A.2 herein further describes the line of business restrictions as they have been subsequently modified by the antitrust court. In particular, the waiver contained in the VMS Waiver Order as it relates to information services transmission is discussed, because that is the authority

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<sup>29</sup>However, the Court did acknowledge the possibility that the FCC could preempt some forms of state structural separation requirements. In particular, the Court noted that:

[t]he Commission has made a plausible argument that some forms of state structural separation requirements would negate its policy of permitting the integration of basic and enhanced services offered on an interstate basis. For example, a state-imposed requirement that carriers use separate physical facilities for all basic telephone and enhanced services offered on an intrastate basis would almost certainly force carriers to separate their interstate services as well.

*Id.*

pursuant to which SBT now offers MemoryCall<sup>SM</sup> without contravening the MFJ Decree.

The MFJ preempts state regulatory action to the extent that such action bars execution of the MFJ Decree. The MFJ Decree includes, of course the subsequent waiver of the information services transmission restriction. In keeping with the general rule of federal preemption under the Supremacy Clause of the United States Constitution, the antitrust court recognized that "a judicial remedy may infringe upon state law only to the extent necessary effectively to protect the federal interest." MFJ, p. 160 (citations omitted.)

C. Effects of Preemption Issues on the Commission's Actions

As discussed above, the FCC's ability to preempt state regulation of intrastate service is narrowly circumscribed and the antitrust court only bars state regulation that directly conflicts with the goals of the MFJ. In that context, the Commission's action here falls well within the scope of its authority and is not preempted by either the FCC or the antitrust court.

The Commission takes its cue from the Ninth Circuit's analysis in California v. FCC. The Commission therefore elects to stay clear of ordering SBT to separate its physical facilities that are used to provide mixed enhanced services (i.e., that have both an intrastate and interstate component) into separate subsidiaries.

However, the Commission believes that MemoryCall<sup>SM</sup> is a purely intrastate telecommunications service. This view is supported by both the record (see, for instance, Testimony of Burgess and Madan,

Transcript, pp. 140 to 145) and the Ninth Circuit's analysis. California v. FCC, 905 F.2d at 1244. Therefore, under the analysis in California v. FCC the Commission might order a fully separate subsidiary requirement for SBT's provision of MemoryCall<sup>®</sup>. However, because we wish to take the least intrusive measure first, a separate marketing organization within SBT may be appropriate at this time.<sup>30</sup> In order to gain maximum protection, the separate marketing organization requirement is intended to insure that the marketing organization that promotes MemoryCall<sup>®</sup> be very separate from the rest of SBT's marketing activities. At the same time, the Commission stops short of requiring duplication of the physical facilities (i.e., the local network facilities) necessary to provide MemoryCall<sup>®</sup> service.<sup>31</sup>

Similarly, the other actions taken by the Commission in this Order are not contrary to the preemption boundaries established by the Ninth Circuit in California v. FCC. Treating the revenues, expenses and investment of MemoryCall<sup>®</sup> above the line is consistent with both the ruling in California v. FCC and the FCC's own

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<sup>30</sup>As discussed in Part V, the Commission will consider whether the separate marketing organization will take the form of a separate subsidiary as part of its further proceedings in this matter. See, page 50, supra.

<sup>31</sup>SBT's preemption claims rest, in large part, on the assumption that the FCC, acting on the remand of California v. FCC, will again attempt to preempt state regulatory requirements like those imposed here, but this time avoid propagating overbroad preemption claims that again must be struck by the federal courts. Leaving the speculative nature of that assumption aside, the Commission's actions here are clearly within the sphere of exclusive state action contemplated by California v. FCC, the controlling case in this matter.

arguments in that case. See, California v. FCC, p. 1242 and f.n. 38 therein. Developing and implementing appropriate regulatory controls for CPNI, CEI and the marketing aspects of SBT's provision of MemoryCall<sup>SM</sup> is certainly not inconsistent with the FCC's approach to its regulation of interstate ES. Indeed, the FCC has devoted substantial effort to developing the regulatory controls it believes necessary to properly regulate interstate ES. The Commission is merely doing the same on an intrastate basis.

The Commission's state regulatory policy and the actions taken herein to achieve that policy also are consistent with the MFJ Decree and VMS Waiver Order. The regulation of MemoryCall<sup>SM</sup> simply does not affect the "federal interest" the MFJ court protects.

First, the MFJ explicitly recognizes the role of state regulation. While the VMS Waiver Order permits BOCs to enter the VMS market, it waives only the provisions of the MFJ itself that forbade entry and there is no language in the VMS Waiver Order that suggests preemption of normal state regulation. This is consistent with the original MFJ which, as noted above, preempted state regulation inconsistent with the MFJ's prohibitions, not state regulation that covers permitted activities. See, Part VI.B, SUPRA.

Second, the type of regulatory controls sought to be developed and deployed by the Commission are consistent with the VMS Waiver Order. The Commission's Order seeks to develop controls that will insure the development of an efficient competitive VMS market free from monopoly abuse. The antitrust court's overall goal is

similar. In performing its cost benefit analysis in favor of allowing BOC entry into the VMS market, the antitrust court decided in favor of BOC entry in part due to the absence of specific, concrete proof of anticompetitive behavior of the BOCs in the VMS market. See, VMS Waiver Order, pp. 21-22, and f.n. 9 of this Order. However, that is precisely the proof adduced in this case. See, Part III.C, SUPRA.

Thus, based on both the original MFJ and the VMS Waiver Order, it is evident the antitrust court does not intend its VMS Waiver Order to preempt state regulation where, as here, evidence is presented giving concrete substance to the contention that a BOC has the opportunity and incentive to behave and, indeed, has behaved anticompetitively in the VMS market. Preemption by the antitrust court is extremely unlikely in the circumstances presented here. Moreover, the freeze of SBT's expansion into the VMS market is only temporary and will last no longer than the time necessary for the Commission to define and deploy appropriate regulatory controls to prevent monopoly abuse. In the Commission's view, such an order is not inconsistent with the information services line of business restriction contained in either the MFJ Decree or the VMS Waiver Order.

## VII.

### SBT'S EQUAL PROTECTION CLAIM

On April 15, 1991, Southern Bell Telephone and Telegraph Company ("SBT") filed its "Motion to Expand the Scope of the Docket

and Reschedule the Hearings" (hereafter, "Motion") in this case. The Motion raises an equal protection claim. Specifically, SBT asserts that regulation of its provision of MemoryCall<sup>®</sup> service without regulation of all other providers of competing services would result in "unfair discrimination against [SBT] . . . in violation of [SBT's] rights to equal protection of the law." Motion, p. 3.

SBT's equal protection claim is without merit. The short answer to SBT's equal protection challenge is: (1) because no one else is similarly situated to SBT, equal protection is not an issue; (2) even if there were others similarly situated, the Commission's decision to regulate SBT's provision of MemoryCall<sup>®</sup> meets the rational basis test that is applied where economic regulation is challenged on equal protection grounds; and (3) it is not a violation of equal protection where the Commission identifies one portion of a problem, i.e., SBT's opportunity and incentive to behave anticompetitively, as opposed to other local exchange companies' similar opportunity and incentive (if such exists), and then attacks the SBT portion of the problem first.

A. The Equal Protection Standard To  
Be Applied In This Case

The law with respect to equal protection of economic interests is well-established. The Equal Protection Clause of the United States Constitution "is essentially a direction that all persons similarly situated should be treated alike." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439, 1055 S.Ct. 3249, 87



L.Ed. 2d 313, 320 (1985).<sup>32</sup> The Equal Protection Clause of the United States Constitution "does not require things which are different in fact or opinion to be treated in law as though they were the same." Timner v. Texas, 310 U.S. 141, 147, 60 S.Ct. 879, 84 L.Ed. 1124, 1128 (1939). Thus, where two classes are sought to be required to be treated identically, but are found to be different in fact or opinion, disparate treatment of them does not represent an equal protection violation. Tirolerland v. Lake Placid 1980 Olympic Games, 592 F.Supp. 304, 319 (N.D.N.Y. 1984).

Even if two classes are similarly situated, they may be disparately treated if the treatment meets a rational basis test. A two step analysis occurs under the rational basis test: (1) Does the challenged action have a legitimate purpose; and, if so, (2) does the classification employed promote that purpose? See, Schweiker v. Wilson, 450 U.S. 221, 234, 101 S.Ct. 1074, 67 L.Ed. 2d 186, 197-198 (1981) ("Thus, the pertinent inquiry [under the rational basis test] is whether the classification employed . . . advances legitimate legislative goals in a rational fashion.") (Bracketed material supplied); Vance v. Bradley, 440 U.S. 93, 97, 99 S.Ct. 939, 59 L.Ed. 2d 171, 176 (1979).

There need not be a tight fitting relationship between the purpose and result. See, Jackson Water Works v. Public Utilities

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<sup>32</sup> SBT does not state whether it bases its equal protection claim on the Federal or State Constitution. However, the Eleventh Circuit Court of Appeals has recognized that under the Georgia Constitution, equal protection analysis applied to economic regulation turns on a rational basis standard aligned with federal equal protection analysis. See, Silverstein v. Gwinnett Hospital Authority, 861 F.2d 1560, 1565-66 (1988).